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IN THE

Supreme Court of the United States

October Term, 1984

E. Wyllys Taylor,

Petitioner,

v.

The United States of America,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Whether profits or proceeds subject to RICO forfeiture under 18 U.S.C. § 1963(a)(1) (1982) are limited to those in defendant's possession at the time of conviction.

List of Parties to the Proceeding in the Court Below

United States of America
Plaintiff/Respondent

E. Wyllys Taylor
Defendant/Petitioner

B. Homer Darby, Sr.
Defendant/Respondent

James L. Conner
Defendant/Respondent

W. Burns Hayter
Defendant/Respondent

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October Term, 1984

E. Wyllys Taylor,

Petitioner,

v.

The United States of America,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

OPINIONS BELOW

The United States Court of Appeals for the Eleventh Circuit affirmed the convictions of petitioner for racketeering, 18 U.S.C. § 1962(c), and wire fraud, 18 U.S.C. § 1343, and the order of forfeiture entered under 18 U.S.C. § 1963(a), as a money judgment for $1,403,288.72. The opinion is reported sub nom. *United States v. Conner,* 752 F.2d 566 (11th Cir. 1985), and is set forth in Appendix A.

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit sought to be reviewed was entered February 4, 1985. A timely petition for rehearing was denied on March 25, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1982).

STATUTE INVOLVED

Racketeering Influenced Corrupt Organizations Act (RICO): 18 U.S.C. § 1963(a) (1982) (amended 1984):[1]

Whoever violates any provision of section

> (a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

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[1] 18 U.S.C. § 1963(a), as amended effective October 12, 1984, is set forth in Appendix H. The language in subsection (a)(1) is unchanged, although other important changes were enacted by the amendment.

STATEMENT OF THE CASE

Petitioner, E. Wyllys Taylor, and two other defendants were charged in the United States District Court for the Middle District of Florida in a multicount indictment alleging racketeering (18 U.S.C. § 1962(c)), conspiracy to engage in racketeering (18 U.S.C. § 1962(d)), and wire fraud (18 U.S.C. § 1343).[2] The charges were based on two large land transactions in Florida in which Farmland Industries, Inc. acquired phosphate deposits. The crux of the government's case was that Taylor and defendant Darby, who were middlemen in or promoters of the transactions, made secret payments out of the proceeds they received for their services to defendant James L. Conner, a Vice President of Farmland. The government contended that these payments were unlawful "kickbacks" to Conner.

The "RICO" conviction was based on the allegation that Taylor, Conner, and Darby were an "enterprise" formed for the purpose of defrauding Farmland. The "pattern of racketeering activity" was based on a series of interstate wire transfers of funds from the parties in the transactions (Farmland and International Minerals & Chemical Corporation, "IMC") which were initially distributed to Taylor and Darby as payment for their services in arranging and structuring the transactions, but some of which were also ultimately distributed to Conner. The government alleged these

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[2]The indictment contained fifteen counts and named six defendants. For purposes of this Petition only, Counts One through Nine are relevant. These charged Petitioner Taylor, James L. Conner, and B. Homer Darby, Sr., with a substantive RICO violation, 18 U.S.C. § 1962(c), conspiracy to commit a RICO violation, 18 U.S.C. § 1962(d), and wire fraud in furtherance of the racketeering scheme, 18 U.S.C. § 1343.

payments were fraudulently obtained and thus constituted violations of the federal wire fraud statute, 18 U.S.C. § 1343. Seven of the payments were also alleged as separate wire fraud counts.

The government sought forfeiture of all monies received by Taylor, Darby and Conner by forfeiture allegations in the indictment. These allegations specified checks and wire transfers issued between March 21, 1977, and March 31, 1983, and were identified by check or account number, date, and payor and payee. A sample forfeiture count is set forth in Appendix D.

The defendants were convicted after a jury trial of the substantive RICO and wire fraud charges.[3] The jury was than instructed on the forfeiture allegations in the indictment. See Appendix E. During trial the government made no attempt to prove that the specific proceeds identified in the forfeiture allegations were still in existence. The jury returned special verdicts that the proceeds identified by the government should be forfeited. Petitioner objected to the government's "Proposed Order and Judgment of Forfeiture" on the ground, inter alia, that it was "a general judgment and, as drafted, would be collectible against any or all assets of the Defendant." See Appendix F. The trial court, over petitioner's objection, then entered general money judgments against the defendants in the following amounts: Taylor - $1,403,288.72; Darby - $1,364,974.86; and Conner - $1,007,823.88. See Appendix G.

The Court of Appeals upheld this forfeiture order and judgment.

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[3]The trial court ordered a judgment of acquittal on the RICO conspiracy count.

REASONS FOR GRANTING THE WRIT

I. The Decision of the Eleventh Circuit in This Case is in Direct Conflict with the Decision of the Court of Appeals for the Seventh Circuit in *United States v. Alexander,* 741 F.2d 962 (7th Cir. 1984).

The Eleventh Circuit in this case upheld the trial court's order of forfeiture and entry of a general money judgment against petitioner Taylor and the other defendants, although the government made no effort to show that the proceeds of the alleged racketeering were still in existence at the time of conviction. The court reasoned that the forfeiture goes to the *amount* of money received as proceeds of racketeering activity, and does not attach to any *specific* monies received by the defendants:

> Since the forfeiture is *in personam,* it follows the defendant as a part of the penalty and thus it does not require that the government trace it, even though the forfeiture is not due until after conviction. Money is a fungible item. It matters not that the government received the identical money which the defendants received as long as the *amount* that was received in violation of the racketeering statute is known. The forfeiture in this case is for a specific amount of money. It is *in personam* and is a money judgment against the defendant for the same amount of money which came into his hands illegally in violation of Title 18, Section 1963(a)(1).
>
> 752 F.2d at 576 (emphasis in original)

Thus, the court concluded: "This is a money judgment and the creditor need not trace the proceeds to identifiable assets." *Id* at 579 (footnote omitted).

This holding is in direct conflict with *United States v. Alexander,* 741 F.2d 962 (7th Cir. 1984) set forth in Appendix C. There, the defendant was convicted of a RICO violation under 18 U.S.C. § 1962(c) and 15 counts of mail fraud. Defendant, an attorney, represented clients before the Cook County Board of Appeals which reviewed property tax assessments. The defendant paid bribes to obtain low assessments. The government sought a forfeiture order in the amount of the legal fees received by the defendant ($51,874.53) relying expressly on 18 U.S.C. § 1963(a)(1).[4] The government had made no effort to show the fees were still in existence at the time of conviction, however. The trial court ordered forfeiture in the amount of $51,874.53. The Seventh Circuit reversed and remanded "for a determination of what profits, if any, were still in existence at the time of conviction." *Id* at 967.

The Seventh Circuit relied on *United States v. McManigal,* 723 F.2d 580 (7th Cir. 1983), which had been remanded to it by this Court following *Russello v. United States,* 464 U.S. 16, 104 S.Ct. 296, 78 L.Ed2d 17 (1983). *Russello* held that forfeitures under 18 U.S.C. § 1963(a)(1) extended to profits or proceeds of racketeering, as well as to interests acquired in other businesses. This overruled the Seventh Circuit's earlier holding in *McManigal.*[5] Nevertheless, on remand,

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[4] "The Government sought forfeiture of defendant's legal fees earned through the bribery scheme under section 1963(a)(1), arguing that defendant's profits were an "interest he has acquired or maintained in violation of section 1962." *United States v. Alexander,* 741 F.2d 962, 966 (7th Cir. 1984).

[5] *United States v. McManigal,* 708 F.2d 276 (7th Cir. 1983).

the Seventh Circuit reaffirmed its holding that the forfeiture order in that case was improper. The *Alexander* decision detailed the history and effect of *McManigal* as follows:

> The Court subsequently vacated our decision in McManigal and remanded for our consideration in light of Russello. In a published order we determined that, Russello notwithstanding, the forfeiture order in McManigal was still improper as there had been no showing that the profits were still in existence at the time of conviction... We have no choice except to follow McManigal, the law of this circuit. We do note, however, in Russello the Court emphasized that the ordinary meaning of "interest" includes an interest in the future distribution of profits and an interest in the current possession of currency. The Court recognized th t the purpose of the forfeiture provision is to separate the racketeer from his dishonest gains. This would seem consistent with our conclusion that a defendant cannot forfeit something he no longer has. In fact, the term "forfeiture" implies loss of an interest in something. See, Black's Law Dictionary 584 (5th ed. 1979); Webster's Third New International Dictionary 891 (1966). Once that "something" is gone, there would be nothing left to forfeit. Thus under McManigal, while the racketeer dissipates his profits on wine, women, and song before his conviction and having dissipated his interest in the profits would have nothing left to forfeit, he would, of course still be subject to a substantial fine and term of imprisonment.
>
> 741 F.2d at 967-68 (emphasis in original)

The decision in the case at bar and *United States v. Alexander* were decided in close proximity and *Alexander* was not argued to nor addressed by the Eleventh Circuit. The government has not sought certiorari in *Alexander.* It is now clear, however, that the Eleventh Circuit's conclusion that a forfeiture of profits or proceeds "is a money judgment and the creditor need not trace the proceeds to identifiable assets", 752 F.2d at 577, is in irreconcileable conflict with the Seventh Circuit's decision in *Alexander* that forfeiture is "improper as there had been no showing that the profits were still in existence at the time of conviction." 741 F.2d at 967.

CONCLUSION

There is a direct and irreconcileable conflict between the United States Courts of Appeals for the Eleventh and Seventh Circuits as to whether the government seeking forfeiture of racketeering profits or proceeds under 18 U.S.C. § 1963(a)(1) must prove that they are in existence at the time of conviction. Petitioner respectfully moves this Court to grant the Petition for Writ of Certiorari to resolve this conflict and to require briefs on the merits and oral argument in this cause.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit has been mailed to: The Solicitor General, Department of Justice, Washington, D.C. 20530; and a copy provided to: Judy S. Hoyer, Assistant United States Attorney, Room 410, 500 Zack Street, Tampa, FL 33602; B. Homer Darby, Sr., c/o Ted W. Weeks, Esq., P.O. Box 2657, Lakeland, FL; James L. Conner, c/o David Maney, Esq., P.O. Box 837, Tampa, FL 33601; W. Burns Hayter, c/o Robert E. Puterbaugh, Esq., P.O. Drawer BS Lakeland, FL 33802; this 24th day of May, 1985.

_____

Kenneth L. Connor

APPENDIX

APPENDIX A

UNITED STATES of America, *Plaintiff-Appellee,*

v.

James L. CONNER, E. Wyllys Taylor, W. Burns Hayter, B. Homer Darby, Sr., *Defendants-Appellants.*

UNITED STATES of America, Plaintiff-Appellee,

v.

E. Wyllys TAYLOR, *et al., Defendants,*

James L. Conner, Defendant-Appellant.

Nos. 84-3008, 84-3018.

United States Court of Appeals,
Eleventh Circuit.

Feb. 4, 1985.

Defendants were convicted in the United States District Court for the Middle District of Florida, Wm. Terrell Hodges, Chief Judge, of racketeering, conspiracy to engage in racketeering, and wire fraud, and they appealed. The Court of Appeals, Daniel Holcombe Thomas, District Judge, sitting by designation, held that: (1) evidence was sufficient to prove a scheme to defraud in connection with real estate transactions, except as to transaction in which kickback came out of third party's pocket, so that breach of fiduciary duty and acceptance of kickback did not create any "detriment" to defendants' employers; (2) wire and mail

fraud statutes as applied in case did not violate defendants' Fifth Amendment right to due process and Sixth Amendment right to be reasonably forewarned of what conduct is criminal; and (3) since forfeiture of specific amount of money was in peronam, it followed defendants as part of penalty, and thus it did not require the Government to trace it, even though forfeiture was not due until after conviction.

Affirmed in part and reversed in part.

1. Criminal Law 1144.13(3, 5)

In reviewing the sufficiency of the evidence, Court of Appeals must make view evidence in light most favorable to government, and must make all reasonable inferences and credibility choices which will uphold the verdict.

2. Criminal Law 1159.2(3)

To affirm, court need only find that reasonable minds could have found the evidence to be inconsistent with the hypothesis of accused's innocence.

3. Fraud 68

The fraudulent aspect of a scheme to "defraud" is measured by a nontechnical standard.

4. Post Office 35(10)
Telecommunications 362

Type of fraud which is perpetrated through a breach of the fiduciary duty owed by an employee to his employer is actionable under the mail and wire fraud statutes; such a breach of duty may involve an employee's failure to disclose material information to his employer. 18 U.S. C.A. §§ 2, 1341, 1343, 2314.

5. Post Office 35(9)

A breach of fiduciary duty constitutes an illegal fraud under mail fraud statute only where there is some detriment to the employer. 18 U.S.C.A. § 1341.

6. Commerce 82.74
Post Office 49(11)
Telecommunications 363

In prosecution for violation of Racketeer Influenced and Corrupt Organizations Act and mail and wire fraud statutes, evidence was sufficient to prove a scheme to defraud with respect to real estate transactions in question, except transaction in which kickback came out of third party's pocket, so that breach of fiduciary duty and acceptance of kickback did not create any "detriment" to defendants' employers. 18 U.S.C.A. §§ 1341, 1343, 1962(c, d).

7. Commerce 82.74
Conspiracy 48.2(2)
Telecommunications 363

In prosecution for racketeering, conspiracy to engage in racketeering, and wire fraud, jury instructions on detriment to defendants' employers were correct. 18 U.S.C.A. §§ 2, 1341, 1343, 1962(c, d), 2314.

8. False Pretenses 49(1)

From evidence adduced defendants could reasonably foresee that there would be interstate transfer of funds in carrying out scheme to defraud for purposes of count charging them with obtaining money by false pretenses. 18 U.S.C.A. § 1343.

9. Constitutional Law 258(3)

Wire and mail fraud statutes as applied in case did not violate defendants' Fifth Amendment right to due process and Sixth Amendment right to be reasonably forwarned of what conduct is criminal, in that defendants were indicted for a "fiduciary fraud," the application of which to mail and wire fraud statutes has been frequently recognized, and in view of fact that wire fraud is a "specific intent" crime. 18 U.S.C.A. §§ 1341, 1343; U.S.C.A. Const. Amends. 5, 6.

10. Fraud 68
Telecommunications 362

Wire fraud is a "specific intent" crime, and specific intent is also required when a fidiciary fraud is alleged. 18 U.S.C.A. §§ 1341, 1343.

11. Criminal Law 37.20

Defendant could not prevail in prosecution for racketeering, conspiracy to engage in racketeering, and wire fraud on theory that he was acting on advice of his attorney, in view of testimony plainly showing that he did not make a full and fair disclosure to his attorney and he did not consult his attorney in good faith for purpose of securing advice on the lawfulness of his future conduct. 18 U.S.C.A. §§ 2, 1341, 1343, 1962(c, d), 2314.

12. Criminal Law 622.2(2)

Defendant could not prevail on defense of misjoinder nor was he entitled to severance as indictment charged him with having participated in the same offenses as the other defendants, racketeering, conspiracy to engage in racketeering, and wire fraud. 18 U.S.C.A. §§ 2, 1341, 1343, 1962(c, d), 2314.

13. Criminal Law 713, 864

Jury was not misled by Government's final argument in forfeiture proceeding that if money was forfeited to the United States, defrauded cooperative had a complete right to make a claim against it as the rightful owner, and trial court's reply to jury's inquiry that defrauded cooperative could lay claim to any monies which might have been forfeited to the United States was a correct statement of the law.

14. Forfeitures 3

Since forfeiture of specific sum of money was in personam, it followed defendants convicted of racketeering and wire fraud as part of penalty, and thus it

did not require that Government trace it, even though forfeiture was not due until after conviction. 18 U.S.C.A. §§ 2, 1341, 1343, 1962(c, d), 1963(a)(1), 2314.

15. Forfeitures 5

Government sufficiently proved nexus between assets and racketeering enterprise claimed in indictment so as to render forfeiture appropriate. 18 U.S.C.A. § 1963(a)(1).

16. Constitutional Law 303
Criminal Law 1213.3

Forfeiture of assets by defendants convicted of racketeering and wire fraud would not constitute a denial of due process and cruel and unusual punishment, in that forfeiture was for the exact amount of money which each defendant illegally received. 18 U.S.C.A. §§ 2, 1341, 1343, 1962(c, d), 1963(a)(1), 2314; U.S.C.A. Const. Amends. 5, 8.

17. Constitutional Law 303

In view of amendment of rule of procedure to provide procedural implementation of criminal forfeiture, all due process requirements can be satisfied through court supervision. Fed.Rules Cr.Proc. Rule 32(b)(2), 18 U.S.C.A.; U.S.C.A. Const. Amend. 5.

David A. Maney, Tampa, Fla., for Connor.

Gibson & Connor, Kenneth L. Connor, Lake Wales, Fla., for Taylor.

Robert E. Puterbaugh, Lakeland, Fla., for Hayter.

T.W. Weeks, III, Weeks, Ruster & Mislovic, Peter K. Mislovic, Lakeland, Fla., for Darby.

Judy S. Hoyer, J. Kirk Brandfass, Asst. U.S. Attys., Tampa, Fla., for plaintiff-appellee.

Appeals from the United States District Court for the Middle District of Florida.

Before GODBOLD, Chief Judge, CLARK, Circuit Judge, and THOMAS,* District Judge.

DANIEL HOLCOMBE THOMAS, District Judge:

These consolidated cases involve a multicount indictment charging six defendants with racketeering in violation of Title 18, § 1962(c) and conspiracy to engage in racketeering in violation of Title 18, § 1962(d) and wire fraud in violation of Title 18, §§ 1341, 1343 and Title 18, §§ 2 and 2314.

Count One charged defendants, Taylor, Darby and Conner with engaging in a pattern of racketeering activity involving two separate real estate transactions referred to as "Farmland-Duval Transaction" and "Farmland-IMC Transaction." This Count charged the three defendants with schemes involving breaches of fiduciary duties resulting from the non-disclosure by defendant-employees of their financial interest in real estate transactions involving their employers. The acts of racketeering charged revolved around mail and wire fraud statutes.

Count Two charged the same three defendants with conspiracy.

Count Three through Eight charged defendant, Conner, with having received secret proceeds and kickbacks which were not disclosed to his employer, Farmland. The defendants Taylor and Darby were charged as having been participants in an enterprise which schemed to conceal Conner's receipt of the secret proceeds and kickbacks.

Count Nine charged Taylor, Darby, Conner, Claghorn, Hayter and Jennings with obtaining money by false pretenses in violation of Title 18, § 1343.

*Honorable Daniel H. Thomas, U.S. District Judge for the Southern District of Alabama, sitting by designation.

Counts Ten through Twelve charged Hayter with a scheme to defraud IMC by means of false pretenses in violation of Title 18, § 1343.

Counts Thirteen and Fourteen charged Hayter and Darby with defrauding IMC by means of false pretenses in violation of Title 18, § 1343.

Count Fifteen charged Hayter and Claghorn with transporting money in Interstate Commerce in violation of Title 18, §§ 2 and 2314.

At the conclusion of the testimony, the Court granted judgments of acquittal as to Taylor, Darby and Conner under Count Two (conspiracy) and as to Hayter and Claghorn under Count Fifteen and as to Claghorn and Jennings on all counts. The jury returned a verdict of guilty as to Taylor in Counts One, Three through Nine; Hayter in Counts Nine through Fourteen; Conner, Counts One, and Three through Nine; and Darby in Counts One, Three through Nine, Thirteen and Fourteen. In view of the convictions on Count One (racketeering), the Count then submitted to the jury the issue of whether or not the funds which were the subject of various mailings and wire transactions described in the indictment should be forfeited to the Government, 18 U.S.C. § 1963. The jury by its verdict determined that the funds described in the indictment should be forfeited and judgments in the following amounts were rendered separately against the three defendants found guilty under Count One, namely, Taylor, $1,403,288.72; Darby, $1,364,974.86; and Conner, $1,007,823.88.

STATEMENT OF THE FACTS

The Defendants

The defendant, E. Wyllys Taylor, at all times pertinent to this case, was Chairman of the Board of the

American Bank of Lakeland, Florida. (He will hereinafter be referred to as Taylor or "the banker").

The defendant, B. Homer Darby,Sr., at all times pertinent to this case was a retired employee of Mississippi Chemical Company. He was also President of the Hub Chemical Company, the business owned entirely by members of his family.

The defendant, James L. Conner, at all pertinent times, was Vice-President in charge of fertilizer manufacturing of Farmland Industries, Inc. (He will hereinafter be referred to as Conner or Vice-President Farmland).

The defendant, W. Burns Hayter, at all pertinent times, was Vice-President of International Minerals and Chemical Corporation (IMC). (He will hereinafter be referred to as Hayter or Vice-President IMC).

THE FARMLAND-DUVAL TRANSACTION

Farmland Industries, Inc., is a cooperative corporation, the members of which are local farmer's cooperatives, principly in the mid-west. The members of the local cooperatives are individual farmers. In broad terms, the overall purpose of Farmland is to improve the economic well being of its farmer members. Its membership includes approximately 2200 local cooperatives comprised of approximately one-half million farmers. Farmland management desired that the company become "basic" or "vertically integrated" in the field of fertilizer manufacture. This means the power to control every phase of the product's development from its source of supply to marketing the finished product. Toward this end, Farmland got into phosphate operation in the early 1960's. Prior to 1976, attempts to obtain phosphate reserved had proved unsuccessful. In 1975 the Duval Company decided to

sell its phosphate holdings in Hardee County, Florida. There seems to be some difference in the interpretation of the testimony as to whether or not Conner, Vice-President of Farmland, learned of this decision through one of Farmland's employees, Murphy, or whether he was advised of it by the defendant, Darby. Suffice it to say, the sale was ultimately consummated through the middleman known as Hardee Properties. Murphy, in substance testified as follows. In January 1976, Farmland, through employee Murphy, learned that the Duval Property was for sale. Murphy advised Conner, Vice-President of Farmland, of the availability of this land on January 27, 1976, at a meeting in Conner's office in Kansas City. Murphy suggested that he, Murphy, on behalf of Farmland, contact Duval directly. Conner, however, said that he, Conner, would make the contact. Conner later told Murphy that he had contacted Duval and was advised that the property was not for sale. However, in May of 1976, Conner advised Murphy that Farmland had entered into an agreement with Hardee Properties to buy the Duval Property. Conner stated that he, Conner, did not know the identity of Hardee Properties, other than S. Thomas Moore. Murphy was surprised that an unknown entity called Hardee Properties was involved in the middle of what was essentially a land transaction between two large corporations, namely, Farmland and Duval. Murphy, over Conner's objections, made sufficient inquiries to learn that Wyllys Taylor, the banker, was involved in Hardee Properties. Murphy knew of the close personal relationship between Taylor and Conner and was concerned that Taylor's involvement might prove embarrassing to Conner. However, Conner showed no reaction to this information. Murphy did not advise anyone else in Farmland of Taylor's involvement because he considered Conner

the key man at Farmland and the one on whom Farmland's Board would depend to get the best possible deal.

In March 1976, Taylor, the banker, requested that Moore handle the transaction in his, Moore's, name so that Taylor's name would not be associated with the deal. On March 26th, Taylor and Darby went to Houston to meet with Douglas Bourne, the Vice-President of Duval. In September of 1976, Taylor instructed Moore to attend a meeting at Duval Headquarters in Houston. Conner, Vice-President of Farmland, accompanied the Farmland's attorney and represented Farmland at the meeting. On December 20, 1976, simultaneous closings between Duval and S. Thomas Moore Partnership and between S. Thomas Moore and Farmland were recorded. S. Thomas Moore Partneship was composed of S. Thomas Moore, E. Wyllys Taylor and B. Homer Darby, Sr. Essentially Duval sold its entire interest in approximately 6,700 acres of land along with its rights under the so-called "Coca Cola Option" for a total of $36,000,000.00. Duval took back a mortgage at 6½% interest. The Moore group then deeded the *mineral rights only* of the property it had acquired from Duval to Farmland for the same price at 8½% interest. The proceeds of the sale which went to the S. Thomas Moore Partnership was sent by wire from Missouri to Texas to Florida, then disbursed according to the partnership agreement. Moore received approximately 5%; two thirds of the remainder going to Taylor and approximately one-third going to Darby. Taylor in turn distributed the monies which he received in accordance with the provision of E. Wyllys Taylor partnership agreement, splitting the funds between Colonial Industries, the Taylor Family Partnership and Timberline Industries, the Conner Family partnership.

Farmland had a written conflict of interest policy, requiring disclosure by all top level employees of any such conflict. Conner consistently failed to disclose his receipt of these funds to Farmland. It was brought out in the trial that the defendants, Taylor and Darby had each received approximately $1,000,000.00 from this transaction and Conner more than $700,000.00. According to the terms of the mortgages which ran through 1984, the total amount of monies which they expected to receive was in excess of $6,000,000.00.

FARMLAND-IMC TRANSACTION

The Carlton interest wished to sell property owned by it known as the Limestone Land Property. Carlton, through their realtor, approached Burns Hayter, Vice President of IMC, and was advised that IMC was interested in purchasing the property. The property was contiguous to the Farmland property purchased from Duval in 1976. Farmland owned property in Hillsboro County contiguous to IMC holdings. Homer Darby purporting to act on behalf of Hub Chemical Company approached Carlton and secured an option to purchase the Limestone Land. E. Wyllys Taylor, the banker, approached IMC with the idea of trading IMC's holdings in Hardee County plus the Limestone Land property to Farmland for certain of its property. The trade was eventually effected and Hub Chemical, Darby Family ownership, was paid $1,200,000.00 for putting the deal together. The $1,200,000.00 was sent by wire from Illinois to Florida. IMC drew a check in this amount payable to Hub, which was deposited in the Trust account of Darby's son and on instructions from Darby, Sr., checks were written from these funds for $720,142.83 to a business owned by Wyllys Taylor, the banker, and another check from $9,606.76, payable to a concern owned by Burns Hayter, Vice-

President IMC. The $720,142.83 check was deposited in the attorney trust account of Roy Maddox, the son of a business partner of Taylor. Maddox, acting on instructions from his father and Taylor wrote a check for $281,717.17 to Conner, the Vice-President of Farmland. Conner did not disclose the receipt of these funds to his employer, Farmland, nor did Hayter disclose the receipt of funds by him to his employer, IMC, but both falsely filed conflict of interest questionnaires which did not reveal that they had received such monies.

THE HAYTER TRANSACTION

Beginning in 1979, IMC was involved in the acquisition of a great deal of real property in Hillsboro County, Florida. Burns Hayter, Vice-President IMC, was the IMC employee primarily involved in this land acquisition program. Hayter approached a realtor named Stephens seeking kickbacks from these real estate transactions. It ultimately resulted in Stephens paying Hayter kickbacks in the amount of $242,000.00 on nineteen separate real estate transactions.

THOMPSON-TOMLINSON TRANSACTION

IMC was interested in acquiring land in Polk County, Florida. The owners of the Polk County land were not interested in selling the property for cash but were interested in making an exchange. Through a series of exchanges the transactions were completed. Upon this consummation, Homer Darby was paid a consulting fee of $200,000.00, out of which he in return paid Burns Hayter, Vice-President of IMC, $99,000.00.

THE CALDWELL TRANSACTION

IMC had been attempting to purchase a piece of property owned by one Caldwell. It had been listed with a realtor named Simmons. Burns Hayter suggested that Simmons consult Homer Darby. The property eventually was sold to IMC resulting in Darby being paid a consulting fee of $40,000.00 which he split with Hayter, Vice-President IMC, giving Hayter, $20,000.00.

As to the Farmland-IMC Transaction and as to each of the Hayter Transactions, the Vice Chairman of the Board of IMC testified that had the Board been aware of Hayter's receipt of funds, the Board would not have consummated the transaction but would have attempted to re-negotiate them. He further testified that had the Board known of it, Hayter would have been terminated.

Simply stated, Taylor, a banker, used his position to help further a scheme to obtain money for himself illegally at the expense of approximately one-half million farmers. Darby and Conner agreeably went along for the ride sharing in the scheme. Hayter used his office as Vice-President in charge of purchasing real estate for his employer, IMC, in order to obtain kickbacks which were shared in by Darby, Taylor and Conner.

THE DEFENSES

The defendants Taylor and Conner contended at the trial that the monies paid by Taylor to Conner on both the Farmland-Duval Transaction and the Farmland-IMC Transaction, were gifts and had nothing to do with the transactions themselves. In support of this defense both Taylor and Conner offered many theories; none of which were believed by the jury nor this court.

Among other defenses, Taylor told the jury that inasmuch as Conner's assistance in two projects in 1960 had helped make him, Taylor, rich, he felt a moral obligation to repay Conner in some manner. Conner contended that he did not learn until after the closing of the Farmland-IMC transaction that Taylor intended to pay him some money.

Among other defenses, Darby testified that he did not know until shortly before the closing of the Farmland-Duval transaction that Conner was to receive any monies. On cross-examination, however, he admitted that even after learning of Conner's receipt of the funds, he co-signed each of the checks from the S. Thomas Moore Partnership to Taylor, knowing that Taylor was paying Conner from the proceeds.

Hayter, while admitting that he had engaged in conflicts of interest and had lied to his employer, IMC about doing so, contended that his activities had in no way economically harmed his employer.

None of these defenses were believed by the jury and we find that the evidence amply supports the wrongdoing of the defendants. The factual issues have been resolved by the jury and their findings are adequately justified.

Of the issues raised by the defense, only one is of sufficient substance to require an in depth discussion by this Court; namely, whether or not the forfeiture judgment against the three defendants constitutes error. This will be discussed later in this opinion.

They also raise the question of whether or not the evidence was sufficient to prove a scheme to defraud.

[1, 2] In reviewing the sufficiency of the evidence, the Court of Appeals must view the evidence in the light most favorable to the Government: *Glasser v.*

United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942); *United States v. Spradlen,* 662 F.2d 724 (11th Cir. 1981). Further, the appellate court must make all reasonable inferences and credibility choices which will uphold the verdict. *United States v. Perez,* 648 F.2d 219 (5th Cir. 1981); *United States v. Becker,* 569 F.2d 951 (5th Cir. 1978). To affirm, the court need only find that reasonable minds could have found the evidence to be inconsistent with the hypothesis of the accused's innocence. *United States v. Spradlen,* supra; *United States v. Moreno,* 649 F.2d 309, 312 (5th Cir.1981); *United States v. Diaz,* 655 F.2d 580 (5th Cir.1981).

[3] Courts in all Circuits have traditionally construed the statute in such a way to effect its broad purpose: to prohibit fraudulent enterprises. The fraudulent aspect of a scheme to "defraud" is measured by a nontechnical standard. *Gregory v. United States,* 253 F.2d 104 (5th Cir.1958).

[4] Specifically, the type of fraud which is perpetrated through a breach of the fidiciary duty owed by an employee to his employer has been held to be actionable under the mail and wire fraud statutes. *Shushan v. United States,* 117 F.2d 110 (5th Cir.1941); *Bradford v. United States,* 129 F.2d 274 (5th Cir.1942); *United States v. George,* 477 F.2d 508 (7th Cir.1973); *United States v. Bryza,* 522 F.2d 414 (7th Cir.1975), *cert. denied,* 426 U.S. 912, 96 S.Ct. 2237, 48 L.Ed.2d 837 (1976); *United States v. Von Barta,* 635 F.2d 999 (2d Cir.1980), and cases cited therein. *See also, United States v. Newman,* 664 F.2d 12 (2d Cir.1981). Such a breach of duty may involve an employee's failure to disclose material information to his employer. *United States v. Ballard,* 663 F.2d 534 (5th Cir. Unit B, 1981), modified 680 F.2d 352 (5th Cir.

Unit B, 1982). *Ballard, supra,* held that a breach of a fiduciary duty must be accompanied by some "detriment" to the employer in order to constitute a violation.

[5] All defendants contend that Farmland and IMC suffered no economic detriment because prices paid by them were within the fair market values, and without detriment they could not be convicted under the Wire Fraud Statute and thus not under RICO either. All substantive offenses arise under the wire fraud statute, 18 U.S.C. § 1343 (1982), which is patterned on § 1341, and except for the mode of transmittal prohibits the same conduct. Under *Ballard, supra,* a breach of fiduciary duty constitutes an illegal fraud under § 1341 only where there is some detriment to the employer.[1]

In its modified opinion the *Ballard* court noted that in an unregulated market the detriment necessary for a finding of mail fraud would be shown by mere receipt of kickbacks. 680 F.2d at 354 n. 5.

[6] All but one of the transactions here fit the *Ballard* model of employer detriment. The Duval deal is an example. Duval was willing to part with the fee simple rights at X price to be financed at 6½ percent interest. Farmland purchased only the mineral rights at X price, financed at 8½ percent. Although the price Farmland paid may have been within the range of prices encompassed within the fair market value of the land had Farmland bought directly from Duval, Duval still would not have demanded more. Farmland could

[1]Cases construing § 1341 apply to construction issues involving § 1343. *U.S. v. Computer Sciences Corp.,* 689 F.2d 1181 (4th Cir.1982), *cert. denied,* 459 U.S. 1105, 103 S.Ct. 729, 74 L.Ed.2d 953 (1983); *U.S. v. Giovengo,* 637 F.2d 941 (3rd Cir.), *cert. denied,* 450 U.S. 1032, 101 S.Ct. 1743, 68 L.Ed.2d 228 (1981).

have captured the fee simple rights rather than merely the mineral rights and also could have obtained the benefit of the lower interest rate. The insertion of Hardee Properties (i.e. Farmland's employee Conner and his co-defendants Darby and Taylor) into the deal caused Farmland to suffer detriment to the extent of the difference between what Duval was willing to accept and what Farmland eventually paid Hardee. The Farmland-IMC deal, the Hillsborough County deal, and the Caldwell transaction analyze out the same way.

The Thompson-Tomlinson deal does not fit this analysis because of the three-party nature of the transaction. Farmland and Thompson had agreed before anything else happened that Farmland would be willing to pay X for the Thompson land. Farmland did in fact pay X for the land when Thompson found the Tomlinson property in which to reinvest those proceeds. Thompson then paid some amount to Tomlinson, who in turn paid the kickback to the defendants. Thus the kickback did not increase the price Farmland paid or decrease the amount Thompson would have been willing to accept for it. Because the kickback came out of the third party's pocket in connection with the deal between Thompson and the third party, it is unrelated to the Thompson-Farmland transaction. The breach of fiduciary duty and the acceptance of the kickback did not create any "detriment" as defined by the *Ballard* court. The convictions of Hayter and Darby on Count 13 must, therefore, be reversed. This does not affect their sentences, nor does it reduce the amount of the RICO forfeiture. The forfeiture only goes to the Duval and IMC deals, not the other transactions.

[7] The jury instructions on detriment were correct.

The constituent elements came out of *Ballard.* The jury found that the evidence was sufficient. We agree.

[8] The defendants question the sufficiency of the evidence to prove that the defendants caused the use of interstate wire facilities in Count Nine. Certainly from the evidence adduced the defendants could reasonably foresee that there would be interstate transfer of funds in carrying out the scheme to defraud.

Another of the defenses puts in issue the constitutionality of the mail fraud statutes. Sections 1341 and 1343, Title 18, have been discussed on numerous occasions. The wire fraud statute is to be interpreted the same as the mail fraud statute and a finding of one being constitutional would necessarily be a finding that the other is constitutional. *U.S. v. Computer Sciences Corp.,* 689 F.2d 1181 (4th Cir.1982), *cert. denied,* 459 U.S. 1105, 103 S.Ct. 729, 74 L.Ed.2d 953 (1983); *U.S. v. Giovengo,* 637 F.2d 941 (3rd Cir.1980); *U.S. v. Lounderman,* 576 F.2d 1383 (9th Cir.1978), *cert. denied,* 439 U.S. 896, 99 S.Ct. 257, 58 L.Ed.2d 243 (1978). Several courts have held the mail and wire fraud statutes facially constitutional in the face of challenges such as this. *Durland v. U.S.,* 161 U.S. 306, 16 S.Ct. 508, 40 L.Ed. 709 (1896) (Interpreting a predecessor statute); *U.S. v. Gartman,* 145 F.Supp. 420 (E.D.Pa. 1956); *U.S. v. Attaway,* 211 F.Supp. 682 (W.D.La.1962); *U.S. v. Bohonus,* 628 F.2d 1167 (9th Cir.1980).

[9, 10] The contention that the wire and mail fraud statutes as applied in this case violate the defendants' Fifth Amendment right to due process and Sixth Amendment right to be reasonably forewarned of what conduct is criminal is of no avail. In the case of *U.S. v. Mazurie,* 419 U.S. 544, 550, 95 S.Ct. 710, 714,

42 L.Ed.2d 706 (1975), we find the following: "It is well established that vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand." These defendants were indicted for a "fiduciary fraud" in violation of Title 18, § 1343. The application of this to the mail and wire fraud statutes has frequently been recognized. *U.S. v. George, supra.* Wire fraud is a "specific intent" crime, and the specific intent is also required when a fiduciary fraud is alleged. *U.S. v. O'Malley,* 707 F.2d 1240 (11th Cir.1983). The *Bohonus* case, *supra,* states: "A statute meets the standard of certainty required by the Constitution if its language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." The case of *Colautti v. Franklin,* 439 U.S. 379, 395, 99 S.Ct. 675, 685, 58 L.Ed.2d 596 (1979), states that "This Court has long recognized that the constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of *mens rea.*" "The requirement that the act must be willful or purposeful may not render certain, for all purposes, a statutory definition of the crime which is in some respects uncertain. But is does relieve the statute of the objection that it punishes without warning an offense of which the accused was unaware." *Screws v. U.S.,* 325 U.S. 91, 102, 65 S.Ct. 1031, 1036, 89 L.Ed. 1495 (1945). There is no merit in the claim of unconstitutionality.

[**11**] The defendant Taylor raised the defense that he was acting on the advice of his attorney. He cannot prevail on this ground. The jury rejected this argument and we agree. The testimony plainly shows that he did not make a full and fair disclosure to his attorney. He did not consult his attorney in good faith for the

purpose of securing advice on the lawfulness of his future conduct.

[12] The defendant Darby raised the defense of misjoinder and moved for severance. He cannot prevail on this issue as the indictment charged him with having participated in the same offense as the other defendants. *U.S. v. Bright,* 630 F.2d 804, 813 (5th Cir.1980), where it is stated by Judge Kravitch: "... The gist of the RICO offense, ... is that the defendant, through a pattern of predicate crimes, furthered a racketeering enterprise. The offense charged here is not the commission of the predicate crimes, but the furthering of the enterprise. *United States v. Elliott,* 571 F.2d 880 (5th Cir.1978), *cert. denied,* 439 U.S. 953, 99 S.Ct. 349, 58 L.Ed.2d 344 (1978). Thus viewed, it is clear that the defendants were alleged to have participated in the same offense and joinder was not improper under Rule 8."

[13] In consolidated Case No. 84-3018, the defendant Conner argues that the jury was mislead by the government's final argument in the forfeiture proceeding. The portion of the argument which it criticized is as follows: "Now, if this money is forfeited to the United States, Farmland has the complete right to make a claim against it as the rightful owner." After the jury retired, it sent the following message to the Court. "Dear Judge Hodges, can Farmland lay claim to monies forfeited to U.S. Government? Is this true or possible?" The Court made the following response. "Members of the Jury, in response to your question, you are instructed that under the applicable statute, 18 U.S.C. Section 1963(c), Farmland could lay claim to any monies which might be forfeited to the United States. However, under the statutes, whether and to what extent any forfeited monies might then be

relinquished to Farmland is a determination that would be made by the Attorney General." We find no reversible error in this argument. Judge Hodge's reply to the jury's inquiry was a correct statement of the law.

FORFEITURE

Title 18, Section 1963(a)(1) reads in part as follows:

> (a) Whoever violates any provision of Section 1962 of this chapter shall be fined not more than $2,500 or imprisoned not more than 25 years or both and shall forfeit to the United States, (1) Any interest he has acquired or maintained in violation of Section 1962.

Defendants Taylor, Darby and Conner were each found guilty by the jury of violating Section 1962 (Count 1, Racketeering). Following the conviction the jury was for the first time informed of the "forfeitures" section of the indictment. Counsel were afforded opportunity to make arguments to the jury and the court instructed the jury on the applicable law. After deliberation, the jury returned special verdicts against the defendants as follows: Taylor, the amount of $1,403,288.72; Darby, $1,364,974.86; and Conner, $1,007,823.88. In each instance Judge Hodges rendered the following order: ". . . that the amount of (specifying the appropriate amount) is hereby granted in favor of the United States of America and against the defendant (specifying him) for which let execution issue." Each of the above three defendants has claimed the forfeiture judgment is error. They in general specify three grounds: (1) that the government did not trace the proceeds to identifiable assets belonging to the defendants; (2) that the government did not prove a nexus between these assets and the

racketeering enterprise claim in the indictment and (3) that the forfeiture of these assets would constitute a denial of due process and cruel and unusual punishment in violation of the Fifth and Eighth Amendments. The defendants must fail on all three arguments.

We are first concerned with the meaning of the phrase "any interest" as set out in 1963(a)(1). The jury has decided that each of these defendants received kickbacks in violation of § 1962(c). If those kickbacks qualify as an "interest" as used in 1963(a)(1) then they are forfeitable. Section 1963(a)(1) as interpreted by the Supreme Court in the case of *Russello v. U.S.*, — U.S. —, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983). In that case the defendant was engaged in racketeering, namely, collecting insurance proceeds from buildings damaged or destroyed by arson. The amounts of insurance collected and dates were specified in the indictments. We quote from *Russello,* "Every property interest, including a right or profits or proceeds may be described as an interest in something. Before profits of an illegal enterprise are divided, each participant may be said to have an "interest" in the ill gotten gains. After distribution, each will have a possessory interest in currency or other items so distributed. We therefore conclude that the language of the statute *plainly covers the insurance proceeds* petitioner received as a result of his arson activities." (emphasis added).

The RICO statute received attention in the case of *U.S. v. Cauble,* 706 F.2d 1322. We quote from page 1349. "The RICO forfeiture is *in personam:* a punishment imposed on a guilty defendant. It deprives that defendant of all of the assets that allow him to maintain an interest in a RICO enterprise, regardless whether those assets are themselves "tainted" by use in connection with the racketeering activity."

We find in the case of *U.S. v. L'Haste,* 609 F.2d 796 (5th Cir.1980), Footnote 15 on page 813, "the forfeiture penalty incorporated in Section 1963 differs from other presently existing forfeiture provisions and federal statutes. Under other statutes, the forfeiture proceeding is *in rem* against the property, since the property being forfeited is itself considered the offender, and the forfeiture is no part of the punishment for the criminal offense. By enacting Section 1963, however, Congress revised the concept of forfeiture as a criminal penalty against the individual, since the proceeding is *in personam* against the defendant and the forfeiture is part of the punishment."

[14] The indictment has cataloged each payment received by these defendants by check and by date. Thus, we see that the extent of the interest which is subject to criminal forfeiture was plainly alleged in the indictment and they were all transmitted by wire and all were received by the defendants in violation of Section 1962. Since the forfeiture is *in personam,* it follows the defendant as a part of the penalty and thus it does not require that the government trace it, even though the forfeiture is not due until after conviction. Money is a fungible item. It matters not that the government received the identical money which the defendants received as long as the *amount* that was received in violation of the racketeering statute is known. The forfeiture in this case is for a specific amount of money. It is *in personam* and is a money judgment against the defendant for the same amount of money which came into his hands illegally in violation of Title 18, Section 1963(a)(1). It is stated in *U.S. v. Huber,* 603 F.2d 387, 396 (2d Cir.1979), RICO is innovative in that it imposes forfeiture "directly on the individual as part of criminal prosecution rather than a separate proceeding *in rem* against the proper-

ty." *Cert. denied,* 445 U.S. 927, 100 S.Ct. 1312, 63 L.Ed.2d 759.

Judge Alvin Rubin gives an excellent history of RICO in the *Cauble* case, *supra.* On page 1345, Judge Rubin states: "Congress added the forfeiture provision to RICO in order to attack the sources of economic power of organized crime in addition to the removing from power and imprisoning those individuals who violate the statute. It viewed the sanctions and remedies against organized crime then available to the government as 'unnecessarily limited in scope and impact.' As enacted the forfeiture provisions are meant to reach the ill-gotten gains of criminals where they enter or operate an organization through a pattern of racketeering activities.'" On page 1350, Judge Rubin states: "We reiterate that property forfeited under RICO need not be 'guilty'."

We realize that the defendants rely heavily on the case of *U.S. v. McManigal,* 708 F.2d 276 (7th Cir.1983). In the *McManigal* case, the defendant appealed from a conviction of mail fraud and racketeering under 18 U.S.C. § 1962, which charged McManigal, a Chicago attorney, for knowingly participating in a scheme to defraud Cook County citizens of their right to have faithful and honest services of two employees of the Cook County Board of Tax Appeals and that as a result of the fraud the law firm in which the defendant had an interest illegally obtained $249,260.00 in legal fees in the form of accounts receivable. Count 16 of the indictment sought forfeiture of *accounts receivable* of the law firm. McManigal had a 40% interest in this $249,250.00 in fees. The forfeitures specifically spelled out that the forfeiture was for accounts receivable in the amount of $99,700.00. The Court in reversing the forfeitures stated among other things, "An interest in accounts

receivable, however, may vanish once the accounts are paid up." In the instant case, the forfeiture is against a specific amount of money, paid directly to the defendants, and not to a firm in which the defendant had an interest. Fees owed to a firm are in the nature of accounts receivable. That distinguishes *McManigal* from the instant case. The forfeiture in *McManigal* was under 1963(a)(2) and not 1963(a)(1). *McManigal* was reversed in part by the Seventh Circuit on December 20, 1983, 723 F.2d 580. The Seventh Circuit specifically states in the reversal after affirming the conviction, reaffirms the original case, "insofar as it holds that the United States can only recover whatever accounts receivable were still in existence at the time of the defendant's conviction. (708 F.2d at 287-290). Therefore the district court's order forfeiting $99,700 to the United States remains reversed."

This is a money judgment and the creditor need not trace the proceeds to identifiable assets.[2]

[15] The defendants next raise the claim that the government did not prove the nexus between these assets and the racketeering enterprise claimed in the indictment. The jury decided this issue by its verdict and needs to further comment.

[16] The defendants next claim that forfeiture of these assets would constitute a denial of due process and cruel and unusual punishment in violation of the

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[2]The "Comprehensive Forfeiture Act of 1984" amended 18 U.S.C. § 1963. This amendment is exactly in line with what has been stated above with regard to forfeiture. Section C. of this amendment states: "All right, title, and interest in property described in Subsection (a) vest in the United States upon the commission of the Act giving rise to the forfeiture under this section.

Fifth and Eighth Amendments. In their argument they state that the order issued by Judge Hodges "subjects this defendant to a penalty which is disproportionate to the crime and at odds with the Congressional objective in enacting this statute." This argument will not stand up. The forfeiture is for the exact amount of money which each defendant illegally received in violation of Title 18, Section 1962.

The Fifth Circuit *en banc* in *U.S. v. Martino,* 681 F.2d 952 at page 961, states: "The plain language of the statute, its remedial and deterrent purposes, and the legislative history all compel the conclusion that Section 1963(a)(1) encompasses forfeiture of the income or profits of racketeering activity." It is further stated in *Martino* at page 960 and 961: "At oral argument the question was raised as to whether the government has an obligation to trace and identify the current form of monetary proceeds before it may collect on a forfeiture order. Clearly, this issue goes to collectibility and related procedures and not to the type of interest forfeitable under 1963(a)(1)."

[17] The advisory committee on the Federal Rules of Criminal Procedure specifically amended Rule 32(b)(2), F.R.Cr.P. to "provide procedural implementation" of the criminal forfeiture. That rule provides that "[w]hen a verdict contains a finding of property subject to a criminal forfeiture, the judgment of criminal forfeiture shall authorize the Attorney General to seize the interest or property subject to forfeiture, *fixing such terms and conditions as the Court shall deem proper.*" (Emphasis added) Therefore, all due process requirements can be satisfied through Court supervision.

The Fifth Circuit affirmed the judgment of the district court on the forfeiture issue. The posture both legally

and factually of the *Martino* case and the instant case are indistinguishable. The forfeiture in both cases was for a money judgment against the exact amount of money which came directly into the defendants' hands as a result of their illegal violation of Section 1962.

The Supreme Court in *Russello v. U.S., supra,* concluded with this statement: "We therefore disagree with the reasoning of the respective courts in the *Marubeni, McManigal, Meyers* and *Thebis* cases, and we affirm the judgment of the U.S. Court of Appeals of the Fifth Circuit." This, though called by a different name, is the *Martino* case recorded in 681 F.2d 952, above discussed.

The judgment of the district court is AFFIRMED except as to the defendants Hayter and Darby, whose convictions under Count 13 are REVERSED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FILED
March 25, 1985
Spencer D. Mercer, Clerk

No. 84-3008

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JAMES L. CONNER,
E. WYLLYS TAYLOR,
W. BURNS HAYTER,
B. HOMER DARBY, SR.,

Defendants-Appellants.

Appeal from the United States District Court for the Middle District of Florida

ON PETITIONS FOR REHEARING

March 25, 1985

Before GODBOLD, Chief Judge, CLARK, Circuit Judge, and THOMAS*, District Judge.

PER CURIAM:

IT IS ORDERED that the petitions for rehearing filed in the above entitled and numbered cause be and the same are hereby DENIED.

ENTERED FOR THE COURT:

United States Circuit Judge

*Honorable Daniel H. Thomas, U.S. District Judge for the Southern District of Alabama, sitting by designation.

APPENDIX C

UNITED STATES of America, *Plaintiff-Appellee,*

v.

Peter C. ALEXANDER, *Defendant-Appellant.*

No. 83-1648.

United States Court of Appeals,
Seventh Circuit.

Argued April 12, 1984.

Decided Aug. 13, 1984.

Rehearing and Rehearing En Banc
Denied Nov. 28, 1984.

Defendant was convicted in the United States District Court for the Northern District of Illinois, James B. Moran, J., on 15 counts of mail fraud and one count of racketeering, and he appealed. The Court of Appeals, Pell, Circuit Judge, held that: (1) indictment charging private attorney with mail fraud for his participation in a scheme involving the bribery of public employees to obtain reductions in real estate assessments sufficiently alleged that the known co-schemers included public employees who had a fiduciary relationship with a county board of appeals which reviewed real estate assessments; (2) for purposes of mail fraud statue, mailing of fraudulently reduced tax bills to clients of defendant was in furtherance of scheme involving bribery of public employees to obtain reductions on real estate assessments; and (3) trial court erred in ordering forfeiture of defendant's profits from scheme involving bribery of

public employees to obtain reduction in real estate assessments without a showing that those profits were still in existence at time of his conviction.

Conviction affirmed; forfeiture order vacated and remanded.

1. Post Office 35

Scheme to obtain tangible property is cognizable under mail fraud statute regardless of relationship between defandant and his victim while an intangible rights scheme is only cognizable when at least one of the schemers has a fiduciary relationship with the defrauded person or entity. 18 U.S.C.A. § 1341.

2. Post Office 48(4)

Indictment charging private attorney with mail fraud for his participation in a scheme involving the bribery of public employees to obtain reductions in real estate assessments sufficiently alleged that the known co-schemers included public employees who had a fiduciary relationship with a county board of appeals which reviewed real estate assessments. 18 U.S.C.A. § 1341.

3. Post Office 35(6)

Mail fraud statute requires that the mails be used for purpose of executing the fraudulent scheme. 18 U.S.C.A. § 1341.

4. Post Office 35(8)

For purposes of mail fraud statute, mailing of fraudulently reduced tax bills to clients of defendant was in furtherance of scheme involving bribery of public employees to obtain reductions on real estate assessments. 18 U.S.C.A. § 1341.

5. Criminal Law 427(5)

Uncorroborated rendition of defendant's own state-

ment was sufficient to establish the elements of coconspirator exception to hearsay rule. Fed.Rules Evid.Rule 801(d)(2)(E), 28 U.S.C.A.

6. Forfeitures 1

Trial court erred in ordering forfeiture of defendant's profits from scheme involving bribery of public employees to obtain reduction in real estate assessments without a showing that those profits were still in existence at time of his conviction. 18 U.S.C.A. § 1963(a)(1).

Jerry B. Kurz, Hall & Kurtz, Chicago, Ill., for defendant-appellant.

Andrea L. Davis, Asst. U.S. Atty., Chicago, Ill., for plaintiff-appellee.

Before PELL and COFFEY, Circuit Judges, and NICHOLS, Senior Circuit Judge.*

PELL, Circuit Judge.

Defendant Peter Alexander was an attorney representing clients before the Cook County Board of Appeals, which reviews real estate assessments made by the Cook County Assessor's Office for purposes of determining the real estate tax owed. Defendant filed complaints before the Board on behalf of clients dissatisfied with their property tax assessments. Assessments are substantially based on subjective criteria and can affect large sums of money, so it should come as no surprise that several Board employees succumbed to the temptation of deciding cases on the basis of bribes paid by attorneys rather than on the merits of the complaint. Defendant's involvement in the bribery scheme resulted in conviction on 15 counts of mail fraud, 18 U.S.C. § 1341, and one count of

racketeering in violation of 18 U.S.C. § 1962(c). The district court sentenced defendant to serve 30 days in a work release program, five years probation, and to forfeit $51,874.53 in legal fees. Defendant challenges both his conviction and the forfeiture order.[1]

I Facts

Defendant is not the first participant in the bribery scheme to have his derelictions become the basis of an opinion by this court. The scheme has been discussed previously in *United States v. McManigal,* 708 F.2d 276 (7th Cir.), *vacated,* — U.S. —, 104 S.Ct. 419, 78 L.Ed.2d 355, *aff'd on remand,* 723 F.2d 580 (1983) and *United States v. Gorny,* 732 F.2d 597 (7th Cir.1984). We will review the scheme so far as it pertains to defendant. Further information on the scheme can be found in *McManigal* and *Gorny.*

The Board was headed by two elected commissioners. During the time of the bribery scheme the commissioners were Seymour Zaban and Harry Semrow. The commissioners were obligated to review complaints after the taxpayer or his attorney presented his case to a hearing officer, who would prepare a file on the case. Because of the high volume of complaints, the commissioners' deputies had the same authority to act on complaints as the commissioners. The scheme involved Zaban's deputy, Donald Erskine,

*Phillip Nichols, Jr., Senior Circuit Judge of the Federal Circuit, is sitting by designation.

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[1]Although defendant filed a fifty page brief in this case presenting a number of issues supporting a claim for reversal, counsel chose to present only two of these in oral argument notwithstanding that the allotted time was substantially not utilized. Nonetheless, we will consider those issues that have any arguable merit.

Semrow's deputies, Thomas Lavin and Robert Hosty, and James Woodlock, who was in charge of computer operations at the Board.

The scheme involved granting reductions in assessments in return for payments made by attorneys. A reduction could only be granted upon the concurrence of both commissioners, neither of whom were involved in the scheme. Both Erskine and Lavin would either forge the signature of the respective commissioners or sign their commissioner's name and subscript their own, as they were authorized to do. Erskine, Lavin, and Woodlock would keep the fraudulent files from being presented to the commissioners. Lavin left the Board in December 1977, and Hosty became Semrow's deputy. Arrangements were made so that Lavin could continue to forge Semrow's signature, and Hosty agreed to subscript Semrow's initials with his own on fraudulent files when necessary.

Defendant was one of five partners in the firm of Welfeld & Chaimson and was the partner responsible for the firm's real estate tax work. Defendant and Erskine were close personal friends, and defendant became involved in the scheme in 1976. The evidence revealed that defendant made payments to Erskine, Woodlock, and Hosty in return for fraudulent reductions.

II Sufficiency of the Indictment

A. Intangible Rights

Defendant challenges the sufficiency of the indictment to charge a violation of the mail fraud statute. In relevant part the mail fraud statute reads:

> Whoever, having devised . . . any scheme or artifice to defraud . . . for the purpose of

> executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service . . . or knowingly causes to be deliverd by mail . . . any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1341.

[1] Defendant presents to us two reasons why the indictment is insufficient. His principal claim is that the indictment alleged only fiduciary fraud, that is, a scheme to deprive the public of the honest services of public employees in the performance of their duties. A scheme to defraud the citizenry and government of an intangible right, such as honest service, can be contrasted with a scheme to obtain tangible property through fraud. A scheme to obtain property is cognizable under the mail fraud statute regardless of the relationship between the defendant and his victim. In contrast, an intangible rights scheme is only cognizable when at least one of the schemers has a fiduciary relationship with the defrauded person or entity. *United States v. Margiotta,* 688 F.2d 108 (2d Cir.1982); *United States v. Freedman,* 568 F.Supp. 450 (N.D.Ill.1983). Defendant asserts that such a fiduciary relationship is missing from the indictment.

[2] Defendant argues that he was not a fiduciary of the Board and that the indictment does not allege that any of his co-schemers were fiduciaries. We readily agree with defendant's claim that he, as a private attorney, was not a fiduciary of the Board. Defendant's second claim, however, is without merit. There can be no doubt that a non-fiduciary to deprive the victim of intangible rights is subject to prosecution under the

mail fraud statute. In *United States v. George,* 477 F.2d 508 (7th Cir.1973), we upheld the conviction of a defendant who gave kickbacks to an employee of Zenith on the theory that Zenith was deprived of the honest services of the employee, although the defendant himself had no fiduciary relationship with Zenith. More recently, the court in *Freedman* observed that, "there is no doubt a private attorney who uses the mails to carry out a scheme to defraud involving the actual bribery of public officials in indictable under Section 1341 on an 'intangible rights' theory." 568 F.Supp. at 453.

The only question is whether the indictment alleged that defendant's co-schemers were public employees who had a fiduciary relationship with the Board. The indictment described the postions held by Erskine, Woodlock, and Hosty and charged that defendant "with other co-schemers both known and unknown" devised a scheme to defraud the Board of the honest services of Erskine, Woodlock, and Hosty. If this were all that the indictment charged the case might be analogous to *Freedman,* in which private attorneys were charged with "known and unknown" co-schemers in taking money from a client to bribe a judge. There was no allegation that the judge was bribed or knew anything about the scheme, and hence there was no basis for assuming that the judge was one of the known co-schemers. The court accordingly dismissed the indictment as insufficient under an intangible rights theory. Here, however, the indictment charges that:

> It was a further part of the scheme to defraud that in return for the bribes paid to Donald Erskine, James Woodlock and Robert Hosty by the defendant Peter C. Alexander; *Erskine,*

> *Woodlock, Hosty and other co-schemers* fraudulently processed complaints filed at the Board of Appeals on behalf of the Welfeld & Chaimson firm. During the period relevant to this indictment, *the co-schemers Erskine, Woodlock, Hosty and others,* fraudulently reduced assessments in over 260 cases filed on behalf of the clients of Welfeld & Chaimson. (emphasis added)

It is clear that the indictment sufficiently alleges that the known co-schemers included Erskine, Woodlock, and Hosty, and that these men were public employees. Nothing more is required to indict defendant under an intangible rights theory.

B. Mailing in Furtherance of the Scheme

[3, 4] Defendant's second claim is that the district court erred in finding that the mailing of the fraudulently reduced tax bills to the clients of defendant was in furtherance of the scheme. The mail fraud statute requires that the mails be used "for the purpose of executing" the fraudulent scheme. 18 U.S.C. § 1341; *United States v. Maze,* 414 U.S. 395, 94 S.Ct. 645, 38 L.Ed.2d 603 (1974). Defendant claims that the mailing of the tax bills here did not further the bribery scheme, which defendant claims was accomplished once the files were altered. Defendant acknowledges that this claim has been rejected in *McManigal, United States v. Feinberg,* 535 F.2d 1004 (7th Cir.1976), *cert. denied,* 429 U.S. 929, 97 S.Ct. 337, 50 L.Ed.2d 300 and *United States v. Lavin,* 504 F.Supp. 1356 (N.D. Ill.1981), all of which involved prosecutions of employes of the Board and attorneys engaged in bribery at the Board. Defendant attempts to distinguish these cases by noting that in all of thes cases there was proof that the legal fees, which were the source of the

bribes, were based on a percentage of the reduction and hence not paid until the tax bills were mailed to the clients. Here there was no proof that Welfeld & Chaimson's fees were dependent upon the client's receipt of the tax bill.

We considered an identical argument in *United States v. Gorny,* 732 F.2d 597 (7th Cir.1984). Gorny, who served as a deputy commissioner at the Board, also argued that without direct proof of a connection between the tax bills and the bribes his conviction for mail fraud could not stand. We rejected this narrow reading of *McManigal* and *Feinberg.*

> While in the case before us the link between the amount of the tax savings and the amount of the bribe is not as direct as in *McManigal* and *Feinberg,* the government has presented a scenario of an ongoing scheme of payments and assessment reductions. It does not matter whether a particular payment preceded or followed a particular influenced action because notice from the tax bills was necessary to assure the bribers that there efforts had been rewarded and thus to induce them to make further payments.

732 F.2d at 602.

The Government here also presented evidence of an ongoing bribery scheme that would not have continued but for the satisfaction of the clients. Defendant can hardly argue that the end product of the bribery, the reduced tax bills, were mere surplusage that did nothing to further the scheme. This scenario is radically differnt from that presented in *United States v. Maze,* upon which defendant relies. In *Maze* defendant used stolen credit cards to purchase goods

and services from hotels. The Government contended that the hotels' mailings of the invoices to the bank that issued the credit cards were in furtherance of defendant's scheme. The Court rejected this, observing that defendant "probably would have preferred to have the invoices misplaced by the various motel personnel and never mailed at all." 414 U.S. at 402, 94 S.Ct. at 649. In contrast with *Maze,* in which the mailings increased the probability of detection of defendant's scheme, this case involves mailings that were the culmination of the scheme.[2]

III Admissibility of Hosty's Statements

[5] The Government did not call Hosty to testify at trial, but did elicit from Erskine several statements Hosty made concerning payments by Welfeld & Chaimson. The court found that the Government sufficiently established that defendant and Hosty were both part of the scheme and that the statements were thus admissible under the co-conspirator exception to the hearsay rule. Fed.R.Evid. 801(d)(2)(E); *United States v. Santiago,* 582 F.2d 1128 (7th Cir.1978).

Defendant challenges the court's findings that the Government established the elements of the co-conspirator exception. This claim is premised on defendant's challenge to Erskine's testimony regarding statements made by defendant. According to

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[2]We note that this conclusion is bolstered by *United States v. Lavin,* 504 F.Supp. 1356 (N.D. Ill. 1981), in which the court found that the mailings were necessary to complete the scheme as the indictment charged a scheme to defraud the citizens of Cook County of their right to have the business of the Board conducted honestly. Mailing tax bills was part of the Board's business and was affected by the bribery. An identical charge was made here and an identical result is required.

Erskine, defendant made a statement concerning paying Hosty $500. Defendant denied making this statement and now claims that Erskine's uncorroborated rendition of defendant's statement is not sufficient to establish that defendant and Hosty were co-conspirators. Defendant's citation of *United States v. Fearn,* 589 F.2d 1316 (7th Cir.1978), in support of this proposition is unpersuasive. *Fearn* stands for the principle "that a *conviction* must rest upon firmer ground that the uncorroborated admission or confession of the accused." *Id.* at 1321 (emphasis added). The standard for establishing guilt, proof beyond a reasonable doubt, is not the standard for establishing the existence of a conspiracy for the purpose of establishing the admissibility of evidence, which is proof by a preponderance of the evidence. *United States v. Xheka,* 704 F.2d 974, 986 (7th Cir.1983), *cert. denied,* — U.S. —, 104 S.Ct. 486, 78 L.Ed.2d 682 (1984). We can find no support for the claim that defendant's own admissions cannot establish the elements of the co-conspirator exception and accordingly reject defendant's claim. We turn now to defendant's claim concerning the propriety of the forfeiture order.[3]

IV Forfeiture of Profits

[6] Defendant challenges on a number of grounds the forfeiture order entered by the district court. Defendant's arguments based on the misconception that his conviction was improper or that there was insufficient evidence to establish the extent of his participation in the scheme are without merit and do not warrant any

[3]We have considered defendant's claim that there was insufficient evidence to support his conviction for the counts based on his dealings with Hosty and find it to be without merit.

discussion. We will, however, discuss defendant's claim that the court improperly required forfeiture of all of the profits defendant derived from the scheme without a showing that those profits were in existence at the time of the conviction.

Under 18 U.S.C. § 1963(a), a defendant convicted of racketeering under 18 U.S.C. § 1962 is subject to imprisonment, a fine, and mandatory forfeiture of:

> (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

The Government sought forfeiture of defendant's legal fees earned through the bribery scheme under section 1963(a)(1), arguing that defendant's profits were an "interest he has acquired or maintained in violation of section 1962." The court agreed with the Government that "interest" includes profits or proceeds and ordered forfeiture of defendant's fees.

Events subsequent to the district court's decision have demonstrated that the court was correct in its reading of "interest." However, we must re-examine the decisions of this court and the Supreme Court to determine a separate contention raised by defendant; are profits subject to forfeiture limited to those in defendant's possession at the time of conviction?

The district court entered the forfeiture order in April 1983. During the following May this court decided *United States v. McManigal,* 708 F.2d 276 (7th Cir.1983), *vacated,* — U.S. —, 104 S.Ct. 419, 78

L.Ed.2d 355, *aff'd on remand,* 723 F.2d 580 (1983). In *McManigal* we affirmed the conviction of another lawyer involved in bribery before the Board, but reversed the forfeiture of fees earned by the attorney. In *McManigal* the Government advanced two grounds in support of the forfeiture. The Government first claimed that profits earned through racketeering were an "interest" under section 1963(a)(1). We rejected this as an overally expansive reading of "interest." The Government alternatively contended that defendant's interest in the accounts receivable of the law firm was "an interest in . . . [an] enterprise which he has established . . . in violation of section 1962," and thus subject to forfeiture under section 1963(a)(2). After examining the language and purpose of the forfeiture provision we determined that "[a] defendant cannot be made to forfeit an interest he no longer possesses on conviction or indictment, either because he has voluntarily divested himself of the interest or because the interest has disappeared." 708 F.2d at 290.

After we decided *McManigal* the Supreme Court issued its opinion in *Russello v. United States,* — U.S. —, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983). *Russello* involved forfeiture of profits earned by an arsonist. The Court held that the profits were subject to forfeiture under section 1963(a)(1) as an "interest" acquired in violation of section 1962. The Court noted that, "The ordinary meaning of 'interest' surely encompasses a right to profits or proceeds." *Id.* at 299. As applied to profits earned by a racketeer, the Court reasoned that:

> Before profits of an illegal enterprise are divided, each participant may be said to own an "interest" in the ill-gotten gains. After distribution, each will have a possessory interest in currency or other items so distributed. We

> therefore conclude that the language of the statute plainly covers the insurance proceeds petitioner received as a result of his arson activities.

Id. at 300. The Court cautioned that the ruling was not intended "to suggest a particular means of calculating the precise amount that is subject to RICO forfeiture in any given case. We hold simply that the 'interest' subject to forfeiture under § 1963(a)(1) are not limited to interests in an enterprise."[4] *Id.* at 304 n. 3.

The Court subsequently vacated our decision in *McManigal* and remanded for our consideration in light of *Russello.* In a published order we determined that, *Russell* nothwithstanding, the forfeiture order in *McManigal* was still improper as there had been on showing that the profits were still in existence at the time of conviction. *United States v. McManigal,* 723 F.2d 580 (7th Cir.1983). The Government now contends that we erred in not ordering forfeiture of McManigal's profits after *Russello. The Government admits that McManigal* and this case are factually identical and that if *McManigal* was decided correctly, the forfeiture order must be remanded for a determination of what profits, if any, were still in existence at the time of conviction.

We have no choice except to follow *McManigal,* the law of this circuit. We do note, however, in *Russello* the Court emphasized that the ordinary meaning of "interest" includes an interest in the *future distribution of profits and an interst in the current* possession of currency. The Court recognized that the purpose of

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[4]The decision of the Fifth Circuit that was reviewed by the Supreme Court in *Russello, United States v. Martino,* 681 F.2d 952 (5th Cir.1982) (en banc), also specifically refused to determine how or when profits were to be measured.

the forfeiture provision is to separate the racketeer from his dishonest gains. This would seem consistent with our conclusion that a defendant cannot forfeit something he no longer has. In fact, the term "forfeiture" implies loss of an interest in something. *See* Black's Law Dictionary 584 (5th ed. 1979); Webster's Third New International Dictionary 891 (1966). Once that "something" is gone, there would be nothing left to forfeit. Thus under *McManigal,* while the racketeer dissipates his profits on wine, women, and song before his conviction and having dissipated his interest in the profits would have nothing left to forfeit, he would, of course still be subject to a substantial fine and term of imprisonment.

We hold, accordingly, that the district court erred in ordering forfeiture of defendant's profits without a showing that those profits were still in existence at the time of conviction. The forfeiture order is VACATED and that portion of the case is REMANDED for further proceedings consistent with this opinion. Defendant's conviction is AFFIRMED.

APPENDIX D

Sample Count of Indictment Alleging Payments Subject to Forfeiture

A. The Duval-Farmland Transaction

(a) Through the aforesaid pattern of racketeering activity, on or about March 21, 1977, Check No. 045837, drawn on the account of Farmland Industries, Inc., account number 1113170, Commerce Bank of Kansas City, Missouri, make payable to S. THOMAS MOORE, and in the amount of $117,875.01 was obtained and disbursed through the First National Bank of McAllen, Texas, and the American Bank of Lakeland, Florida, to the Defendants E. WYLLYS TAYLOR, B. HOMER DARBY, SR., and JAMES L. CONNER in the following amounts:

E. Wyllys Taylor - $45,508.23
B. Homer Darby, Sr. - $40,710.10
James L. Conner - $25,655.73

Said interest and property is subject to forfeiture to the United States pursuant to the provisions of Title 18, United States Code, Sections 1963(a) and (c).

APPENDIX E

* * * * *

THE COURT: Members of the jury, as I said before and as you will remember, Count One of the indictment charged the Defendants Taylor, Darby, and Conner with having violated Title 18 United States Code, Section 1962, Subsection C, by participating through a pattern of racketeering activity in the conduct of the affairs of an enterprise, the activity of which affected interstate commerce.

Since you have determined that those defendants did violate Section 1962(c) as charged in Count One, you must now decide whether those particular defendants must forfeit certain money or proceeds alleged in Count One as being subject to forfeiture under Section 1963, Subsection A, of Title 18, United States Code, which provides in part as follows, and I quote, "Whoever violates any provisions of Section 1962 of this chapter shall forfeit to the United States, one, any interest he has acquired or maintained in violation of Section 1962; and two, any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of Section 1962."

The term forfeiture means to be divested of the ownership of something as penalty for the commission of a crime. A portion of the indictment not previously furnished to you describes in particular the money or proceeds allegedly subject to forfeiture to the United States, and you will have a copy of that additional portion of the indictment in the jury room for study during your supplemental deliberations.

With regard to each of those claims of forfeiture, you are instructed that to be entitled to such forfeiture, the government must have proved beyond a reasonable doubt, first, that the sum of money or proceeds sought to be forfeited constituted an interest acquired by the defendant or specified defendants as charged, and, secondly, that such interest was acquired by the defendant in violation of Title 18, United States Code, Section 1962(c) through and as a result of the conduct of the enterprises affairs through the pattern of racketeering activity committed by such defendant as charged in Count One.

In your consideration of the forfeiture claims of Count One, you are instructed that your previous determination that the defendants now under consideration are guilty of having committed the offense alleged in Count One is final and conclusive, and you must not seek to discuss or determine anew the guilt or innocence of those defendants.

You are further admonished that all of the instructions previously given to you concerning the consideration of the evidence, credibility of the witnesses, the government's burden of proof beyond a reasonable doubt, your duty to give separate and individual consideration to the case of each defendant, your duty to deliberate together, and the necessity of a unanimous verdict, will all continue to apply during your supplemental deliberations concerning the forfeiture claims in Count One.

The specific instructions I gave you earlier concerning Count One and definition of enterprise and pattern of racketeering activity also continue to apply.

Insofar as any forfeiture against the defendant E. Wyllys Taylor is concerned, you are instructed that

good faith is a complete defense to these forfeiture pleadings which have been constituted by the government. Therefore, if you find that the Defendant Taylor, before receiving any of the monies which the government seeks forfeiture of in these proceedings, consulted an attorney whom he considered competent in good faith and for the purpose of securing advice on the lawfulness of his possible future conduct and made a full and accurate report to his attorney of all of the material facts of which he had the means of knowledge and acted strictly in accordance with the advice of his attorney given following this full report, then such monies are not subject to forfeiture to the United States Government.

With respect to these several claims of forfeiture, you will be provided a series of special verdict forms for your conveniece and use. You will note that there is a separate special verdict form as to each separate item sought to be forfeited.

You will have also a copy of that portion of Count One of the indictment which sets out or alleges in detail each of the sums of money sought to be forfeited by the United States in this case. The verdict form which you will be given with respect to these issues simply constitutes another copy of the indictment itself, but with the added provision on the bottom of each page the following form which will be your special verdict form concerning your findings with regard to the sums of money alleged or described on that page.

The special verdict form reads, "we the jury unanimously find beyond a reasonable doubt that the defendant's named below acquired the funds alleged above through a pattern of racketeering activity as charged in Count One of the indictment, and we

hereby declare the same to be an interest and property forfeited to the United States."

Then, under that, there is recited, "as to the Defendant Taylor," and a place for you to insert or check your finding, either yes or no, according to your unanimous determination as to whether those funds should be forfeited in this instance as to Mr. Taylor.

Then, under that, similar findings as to the Defendant Darby and as to the Defendant Conner; with the concluding declaration again, "so say we all," to signify your unanimity and a place for the signature of the foreman and a place for the insertion of the date with respect to those issues.

You will take these verdict forms with you to the jury room, and when have you reached unanimous agreement as to each claim of forfeiture, you will have your foreman fill in, date, and sign them and then return with your special verdict or verdicts to the courtroom.

I will ask now, ladies and gentlemen, that you retire to the jury room to commence your supplemental deliberations concerning these issues. Mr. Gay will be bringing to you the copy of the indictment, the verdict forms, the exhibits which were previously removed, and the new exhibits which have been received. But I will ask now that you retire to the jury room, please.

* * * * *

APPENDIX F

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

United States of America	)	
vs	)	Case No. 83-71-CR-T-10
	)	
E. Wyllys Taylor,	)	
E. Homer Darby, Sr.,	)	
James L. Conner,	)	
T. J. Cleghorn,	)	
W. Burns Hayter and	)	
Thomas E. Jennings,	)	
	)	
Defendants	)	
	)	

Objection To Government's Proposed Order and Judgment Of Forfeiture And Motion For Judgment Nothwithstanding The Verdicts Arising Out Of The Forfeiture Proceedings

Defendant, E. WYLLYS TAYLOR, objects to the entry of the Government's proposed Order and Judgment of Forfeiture and moves the court to vacate the verdicts arising out of the forfeiture proceedings and enter judgment in his favor notwithstanding the verdicts (and in accordance with Exhibit "A", attached) for the following reasons:

1. The Government has submitted a proposed Order and Judgment of Forfeiture.

2. The Government's proposed judgment amounts to a general judgment and, as drafted, would be collectible against any or all assets of the Defendant.

3. The Government's proposed judgment is overbroad and would permit the Government to levy on assets of the Defendant in satisfaction of the judgment which are beyond the scope of: (a) the terms of the Indictment; and (b) the terms of 18 U.S.C. § 1963 and Congress' intent in enacting that statute.

4. At trial, the Government failed to trace the monies which were allegedly acquired in violation of a pattern of racketeering activity into any of the Defendant's existing assets. Absent a showing of the required nexus between the alleged violations of law and the assets which the Government now seeks to have forfeited or against which the Government seeks execution in satisfaction of its judgment, the Court should refuse to enter judgment on behalf of the Government.

5. The Government's proposed judgment violates Defendant's rights under the Fifth and Eighth Amendments to the U.S. Constitution.

6. Only those funds paid to Conner or Hayter could have triggered a breach of fiduciary duty owed to Farmland and IMC. Therefore, those monies received by Taylor and which were not paid to Conner or Hayter cannot be deemed to have been received in violation of a breach of fiduciary duty, and hence, are not subject to forfeiture.

Memorandum In Support Of Defendant Taylor's Objection To Government's Proposed Order And Judgment Of Forfeiture And Motion For Judgment Notwithstanding The Verdicts Arising Out Of The Forfeiture Proceedings

1. THE PROPOSED JUDGMENT SUFFERS FROM OVERBREADTH

A. *The proposed forfeiture is significantly broader than the claimed forfeiture set forth in the Indictment.*

The property which was claimed by the Government to be the subject of forfeiture in the Indictment is identified on pages 11-82 of the Indictment. On each of those pages, monies which were the subject of a *particular* check or wire transfer were claimed to have been acquired through a pattern of "racketeering activity." In its various special verdicts, the jury found that said monies were indeed acquired through a pattern of racketeering activity and declared "the *same* to be an interest and property forfeited to the United States."

During the course of the trial, however, the Government offered *no evidence* tracing the monies for which forfeiture was sought into any of the Defendant's existing assets. The Government has, therefore, failed to establish the required nexus between an alleged violation of 18 U.S.C. § 1962 and the property which is subject to execution and sale under its proposed general judgment. Although the Indictment seeks forfeiture of *specific* "interest and property," the effect of the judgment is *general* in that *any or all* of the Defendant's existing property could be levied upon and sold in satisfaction of its judgment. However, as was recently pointed out by one legal commentator,

> Unlike common law forfeiture, § 1963(a)(1) forfeiture does not reach *all* of the defendant's

> personal and real property upon his conviction. It is carefully designed to reach *only those interests which are related to the RICO violation.* [emphasis supplied]
>
> Weiner, "Crime Must Not Pay: RICO Criminal Forfeiture in Perspective," 1981 N.Ill.U.L.Rev. 225, 242.

Rule 32(b)(2), F.R.Cr.P., provides:

> When a verdict contains a finding of property subject to a criminal forfeiture, the judgment of criminal forfeiture shall authorize the Attorney General to seize *the interest or property subject to forfeiture,* fixing such terms and conditions as the court shall deem proper.

The "interest or property subject to forfeiture" was that identified in the Indictment. But, the Government's proposed judgment does *not* identify the interest or property subject to forfeiture. Therefore, the Government's proposed judgment does not meet the requirements of Rule 32(b)(2) and the court should refuse to enter it. Furthermore, since the Government failed to introduce evidence which traced the interest and property it deemed subject to forfeiture into the existing assets of the Defendant, the court should refuse to enter the Government's Proposed Order and Judgment of Forfeiture.

B. *The proposed judgment is broader is scope than the terms of 18 U.S.C. § 1963 and Congress' intent in enacting the statute.*

18 U.S.C. § 1963(a) provides:

> Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty

> years, or both and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

In each case where forfeiture is allowed under the statute [(1) and (2) above], the allowable forfeiture is limited to interest or property which are *related* to violations of 18 U.S.C. § 1962. See, e.g., H.R.Rep. No. 91-1549, p. 57 (1970) and *Russello v. United States,* 104 S.Ct. 296 (1983). Although the Supreme Court in the recent case of *Russello v. United States,* supra, adopted an expansive view of the kind of "interest" which was the subject of forfeiture, it did not relax the requirement of the statute that the claimed interest be related to a violation of 18 U.S.C. § 1962. The broad goal of Congress in enacting 18 U.S.C. § 1963 was to separate the racketeer from his "dishonest" gains, *Russello v. United States,* supra. To require the sale of any or all of the assets now owned by the convicted defendant and which were not obtained in violation of 18 U.S.C. § 1962 exceeds Congress' intent and would not further the statutory goal.[1]

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[1]*Russello* does not specifically address the issue of the "tracing" requirement raised above. The Fifth Circuit addressed the matter casually, but did not pass on it in the underlying opinion of *United States v. Martino,* 681 F.2d 952, 960-961 (5th Cir.1982). There, the court noted:

> At oral argument a question was raised as to whether the goverment has an obligation to trace and identify the current form of monetary proceeds before it may collect on a forfeiture order. Clearly this issue goes to collectibility and related procedures and not to the type of

As drafted, the Government's Proposed Order and Judgment of Forfeiture is overbroad and extends to property which is not included within the terms of 18 U.S.C. § 1963 and is beyond Congress' intent in enacting the statute. The court should, therefore, decline to enter it.

> interests forfeitable under § 1963(a)(1). *The parties did not brief this issue, and we do not resolve it today.* Under 18 U.S.C. § 1963(c) and Federal Rule of Criminal Procedure 32(b)(2), the district court must determine the terms and conditions under which the defendants must comply with the monetary forfeitures declared in the special jury verdict and affirmed by our holding today. Because on remand the district judge must undertake this task, we make a few observations on the nature of the questions with which he must grapple. Focusing on the in personam character of RICO criminal forfeiture, the government contends in a supplemental letter to this court that it has no obligation whatever at this point to trace the insurance proceeds into their current form. According to the government, the monetary forfeiture order is like any other money judgment, permitting it to satisfy the judgment from any of the defendants' current assets. Commentators, on the other hand, have suggested that normal principles of restitution, particularly the theories of constructive trust and equitable lien, should be applied to trace forfeitable property that has changed form. *We intimate no views on the question,* leaving it for the district court to determine in the first instance if the issue be raised there. [Emphasis supplied]

As the matter now stands, this court must address the issue without much clear guidance from the appellate courts. Perhaps the clearest guidance available to this court, however, is the following language from the Supreme Court's opinion in Russello:

> From all this, the intent to authorize forfeiture of racketeering profits seems obvious. H.R.Rep. No. 91-1549, p. 57 (1970), recites that the forfeiture provision extends 'to all property and interests, as broadly defined, which are *related* to the violations.' (Westlaw Opinion, p. 17 of 19) [Emphasis supplied]

2. AS DRAFTED, THE GOVERNMENT'S PROPOSED JUDGMENT VIOLATES DEFENDANT'S RIGHTS UNDER THE FIFTH AND EIGHTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The effect of the Governments proposed judgment would be to deprive the Defendant of his property, without due process of law, in violation of his rights under the Fifth Amendment to the United States Constitution, and would subject him to cruel and unusual punishment in violation of his rights under the Eighth Amendment to the United States Constitution.

Since the Indictment sets forth the *specific* property which the Government deemed was subject to forfeiture, to now impose a *general* judgment which could be satisfied out of any or all of Defendant's assets offends basic notions of due process. Defendant was not previously afforded any notice or opportunity to be heard by the jury on the propriety of entering a verdict which would require the execution and sale of any or all of the Defendant's assets. Furthermore, if any or all of the Defendant's assets are permitted to be levied upon and sold in satisfaction of the judgment, without the Government having traced the specific interests which the Government sought forfeiture of in the Indictment into said assets, such a shockingly disproportionate penalty would violate his rights under the Eight Amendment which protects him against the infliction of "cruel and unusual punishments."

3. FUNDS WHICH WERE NOT PAID TO CONNER OR HAYTER SHOULD NOT BE SUBJECT TO FORFEITURE.

Throughout this case the Government has contended that the payments to Conner and Hayter without disclosure to their respective employers

worked a breach of fiduciary duty, and thereby constituted an essential element of the offenses of wire and mail fraud. The Government has not maintained, and indeed cannot maintain, that money received by Taylor which was not paid to either Hayter or Conner worked a breach of fiduciary duty, since no fiduciary duty was owned by Taylor to Farmland of IMC. Since only those monies paid to Conner and Hayter could have worked a breach of fiduciary duty, only those monies should be the subject of forfeiture. Nevertheless, monies received by Taylor, but not paid to Defendant Conner, were also deemed subject to forfeiture by the jury, and to that extent, the verdicts are contrary to the law and should be vacated and set aside.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Objection to Government's Proposed Order and Judgment of Forfeiture and Motion for Judgment Nothwithstanding the Verdicts Arising Out of the Forfeiture Proceedings has been furnished Judy S. Hoyer, Assistant United States Attorney, Attorney for UNITED STATES, Room 410, 500 Zack Street, Tampa, FL 33602; Ted W. Weeks, III, Attorney for DARBY, Post Office Box 2657, Lakeland, FL 33803; David Maney, Attorney for CONNER, One Mack Center, 501 E. Kennedy Blvd., Tampa, FL 33602; Robert E. Puterbaugh, Attorney for HAYTER, Post Office Drawer BS, Lakeland, FL 33802; remaining counsel in this case, by mail, this 5th day of December, 1983.

GIBSON & CONNOR

Kenneth L. Connor
Post Office Box 1199
Lake Wales, FL 33853
813/676-8584
Trial Counsel for TAYLOR

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

EXHIBIT "A"

United States of America,	)	
	)	
vs.	)	Case No. 83-71-CR-T-10
	)	
E. Wyllys Taylor,	)	
E. Homer Darby, Sr.,	)	
James L. Conner,	)	
T. J. Cleghorn,	)	
W. Burns Hayter and	)	
Thomas E. Jennings,	)	
	)	
Defendants	)	
	)	

Defendant Taylor's Proposed Judgment Notwithstanding The Verdicts Arising Out Of Forfeiture Proceedings

THIS CAUSE came on for consideration on the Government's Proposed Order and Judgment of Forfeiture and Defendant Taylor's Objection to Government's Proposed Order and Judgment of Forfeiture and Motion for Judgment Notwithstanding the Verdicts Arising out of the Forfeiture Proceedings, and the Court having reviewed the Proposed Order and Judgment and Defendant's Objection, and having considered the arguments of counsel, and having heard the testimony and reviewed the evidence introduced by the Government at the trial finds and decides as follows:

There is no evidence in the Record tracing the funds which the Government sought forfeiture of in the Indictment to the existing assets of the Defendant Taylor. The Government has, therefore, as a matter of law, failed to establish the required legal nexus between any violation of 18 U.S.C. § 1962 and the assets which it now seeks forfeiture of in its Proposed Order and Judgment of Forfeiture.

It is, therefore, ORDERED AND ADJUDGED:

1. The Court refuses to enter the Government's Proposed Order and Judgment of Forfeiture.

2. The special verdicts of the jury arising out of the forfeiture proceedings are hereby vacated and set aside.

3. The Government shall recover nothing from the Defendant Taylor and shall go hence without day.

_____

WILLIAM TERRELL HODGES

APPENDIX G

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

United States of America,	)	
	)	
v.	)	Case No. 83-71-CR-T-10
	)	
E. Wyllys Taylor,	)	
B. Homer Darby, Sr., and	)	
James L. Conner	)	
	)	

ORDER AND JUDGMENT OF FORECLOSURE

On November 3, 1983, the Defendants E. Wyllys Taylor, B. Homer Darby, Sr., and James L. Conner were convicted by a jury of a violation of 18 U.S.C. § 1962(c). On that same date, the same jury returned special verdicts against each of those defendants declaring certain interests and properties held by them to be forfeited to the United States under the provisions of 18 U.S.C. § 1963. It is now hereby

ORDERED:

1. As to the Defendant E. Wyllys Taylor, that the amount of $1,403,288.72 is hereby forfeited and that judgment in the sum of $1,403,288.72 is hereby granted in favor of the United States of America and against the Defendant E. Wyllys Taylor, for which let execution issue.

2. As to the Defendant B. Homer Darby, Sr., that the

amount of $1,364,974.86 is hereby forfeited and that judgment in the sum of $1,364,974.86 is hereby granted in favor of the United States of America and against the Defendant B. Homer Darby, Sr., for which let execution issue.

3. As to the Defendant James L. Conner, that the amount of $1,007,823.88 is hereby forfeited and that judgment in the sum of $1,007,823.88 is hereby granted in favor of the United States of America and against the Defendant James L. Conner, for which let execution issue.

4. That the Defendants E. Wyllys Taylor, B. Homer Darby, Sr., and James L. Conner shall have thirty (30) days from the date of this Order to attempt to obtain a stay of its provisions. Absent a grant of a stay by the United States Court of Appeals for the Eleventh Circuit within that period, the forfeitures ordered herein will take immediate effect upon the expiration of that time.

DONE and ORDERED at Tampa, Florida, this 21st day of December, 1983.

_____

UNITED STATES DISTRICT JUDGE

APPENDIX H

§ 1963. Criminal penalties

(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States, irrespective of any provision of State law—

(1) any interest the person has acquired or maintained in violation of section 1962;

(2) any—

(A) interest in;

(B) security of;

(C) claim against; or

(D) property or contractual right of any kind affording a source of influence over;

any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of in violation of section 1962; and

(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.

The court, in imposing sentence on such person shall order, in addition to any other sentence imposed pursuant to this section, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this section, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

* * * * *

Supreme Court, U.S.
FILED
AUG 19 1985

No. 84-1853

In the Supreme Court of the United States

OCTOBER TERM, 1985

E. WYLLYS TAYLOR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

BEST AVAILABLE COPY

4 pp

In the Supreme Court of the United States

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that his racketeering proceeds were not subject to forfeiture under 18 U.S.C. 1963(a) because the government failed to prove that he still had the money at the time of conviction.

1. After a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted on one count of racketeering, in violation of 18 U.S.C. 1962(c), and seven counts of wire fraud, in violation of 18 U.S.C. 1343. On the racketeering count, he was sentenced to four years' imprisonment, all but six months of which was suspended in favor of two years' probation; he was also ordered to forfeit approximately $1.4 million of racketeering proceeds, pursuant to 18 U.S.C. 1963(a). On the wire fraud counts, imposition of sentence was suspended in favor of two years' probation. The court of appeals affirmed (Pet. App. A1-A27).

The evidence at trial, the sufficiency of which is not in dispute, is set out in the opinion below (Pet. App. A9-A11). Briefly, it showed that petitioner, then Chairman of the Board of the American Bank in Lakeland, Florida, was surreptitiously involved in several fraudulent land deals in Florida with co-defendant James L. Conner. By the frauds, Conner breached his fiduciary duty to Farmland Industries, Inc., of which he was a vice-president. For example, in one transaction Conner and petitioner purchased land that Farmland was interested in acquiring. They then sold the mineral rights to Farmland for the same price that they themselves paid for complete ownership of the land. In that deal (the Farmland-Duval Transaction), petitioner received approximately $1 million in profits.

2. After finding petitioner guilty of racketeering, in violation of 18 U.S.C. 1962(c), the jury returned a verdict of forfeiture, pursuant to Fed. R. Crim. P. 31(e). The district court then entered an order and judgment of forfeiture against petitioner for $1,403,288.72 (Pet. App. A59-A60), rejecting petitioner's contention that forfeiture was not permitted because the government had not traced the racketeering proceeds to assets then in his possession.

On appeal, the court of appeals likewise rejected petitioner's contention. Instead, it held (Pet. App. A25) that the government was not obligated to trace the money that petitioner received from his illegal activities because money is fungible and that the forfeiture order merely constituted a personal money judgment to be satisfied from petitioner's assets. The court also noted that a subsequent amendment of the RICO forfeiture provision (18 U.S.C. 1963, as amended by Pub. L. 98-473, Tit. II, §§ 302, 2301(a)-(c), 98 Stat. 2040, 2192), now makes it perfectly clear that the right to forfeiture of proceeds from racketeering activity vests in the government at the time when the defendant commits the illegal acts. Pet. App. A25 n.2.

3. Petitioner contends (Pet. 5-8) that the opinion below is in direct conflict with *United States* v. *Alexander,* 741 F.2d 962 (7th Cir. 1984), and other Seventh Circuit decisions. However, in *United States* v. *Ginsburg,* 753 F.2d 1079 (1985) (Table), the Seventh Circuit has granted rehearing en banc to consider whether it should adhere to the prior decisions on which petitioner relies. Because the Seventh Circuit is re-examining its position, the intercircuit conflict on which petitioner relies is not ripe for resolution at this point.

Additionally, the recent amendment to the RICO forfeiture provision eliminates any need for review by this Court of disagreements in construction of the old law. Under 18 U.S.C. 1963, as amended, the government's right to forfeiture of racketeering proceeds vests at the time when the defendant commits the offense and extends not only to property constituting but also to property "derived from" racketeering profits or proceeds. Moreover, Section 1963(a) now authorizes a fine of up to twice the amount of any illicit profits or proceeds; thus, whether there is any tracing obligation with respect to money proceeds is also a question of little practical consequence. While we believe that the Eleventh Circuit correctly construed the meaning of the RICO forfeiture provision as it existed prior to this amendment, this question is of greatly decreased and diminishing importance in light of the new statute. Accordingly, review by this Court is unwarranted.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Acting Solicitor General

AUGUST 1985

DOJ-1985-08

Supreme Court, U.S.
FILED
SEP 23 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 84-1853

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UNITED STATES OF AMERICA

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SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

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SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

The issue in this case is whether, in order to forfeit a defendant's racketeering proceeds under the prior version of 18 U.S.C. 1963(a)(1), the government must prove that the defendant still had the money at the time of conviction. In our response to the petition, we acknowledged that the decision below was in direct conflict with *United States* v. *Alexander*, 741 F.2d 962 (7th Cir. 1984), and other Seventh Circuit decisions. We pointed out, however, that in *United States* v. *Ginsburg*, 753 F.2d 1079 (1985) (Table), the Seventh Circuit had granted rehearing en banc to consider whether it should adhere to its prior decisions on which petitioner relies.

We file this supplemental memorandum in order to inform the Court that on September 13, 1985, the en banc court of appeals rendered its opinion in *Ginsburg*. Expressly overruling the previous decisions relied on by

petitioner (slip op. 8), the court held that the government was not required to show that the proceeds of racketeering activity were still in existence at the time of a defendant's conviction before it could obtain forfeiture of the proceeds under old Section 1963(a)(1). Accordingly, there is no longer any conflict among the circuits on this issue warranting the Court's review.

Respectfully submitted.

CHARLES FRIED
Acting Solicitor General

SEPTEMBER 1985

DOJ-1985-09